Upper Tribunal
(Immigration and Asylum Chamber)

Yarce (adequate maintenance: benefits) [2012] UKUT 00425(IAC)

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 19 June 2012	
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Before

UPPER TRIBUNAL JUDGE STOREY

UPPER TRIBUNAL JUDGE PETER LANE

UPPER TRIBUNAL JUDGE WARD

Between

E NTRY CLEARANCE OFFICER, MADRID

Appellant

and

JAHAN ALEXANDER RAMIREZ YARCE

Respondent

Representation :

For the Appellant: Mr G. Saunders, Senior Home Office Presenting Officer

For the Respondent: Mr T. Hussain, Counsel, instructed by Parker Rhodes Hickmotts Solicitors

1. The requirement to show that a person or persons can be maintained (or will maintain themselves) “adequately” without recourse to public funds has long been a requirement of the immigration rules. It continues to be a requirement for various

categories of person in the amended rules that came into force in July 2012. In order to establish that maintenance is “adequate” under the rules as in force before 9 July 2012, an applicant needs to show that the resources available will meet or exceed the relevant income support level set by the United Kingdom government (KA (Pakistan) [2006] UKAIT 00065). A similar requirement is to be found in the definitions of “adequate” and “adequately” in paragraph 6 of the rules as amended in July 2012.

2. In calculating the level of resources that will be available to the applicant and any relevant family members, after the claimant’s hypothetical arrival in the United Kingdom, it may be necessary to consider the effect on such a member’s entitlement to benefits of income and/or capital.

3. Income support is a means-tested benefit. The general rule is that all income, including that from other social security benefits, is to be taken into account when calculating an individual’s entitlement to income support, unless a specific “disregard” applies. A list of disregards is to be found in Schedule

9 to the Income Support (General) Regulations 1987. They include "voluntary payments". For the purposes of the 1987 Regulations, a voluntary payment is a payment by a third party, without anything being obtained in return, tangible or otherwise (R v Doncaster Borough Council ex parte Boulton [1993] 25 HLR 195; R(H) 5/05).

4. Access to capital may have an effect upon a person's means tested benefits, provided that the person concerned has a beneficial interest in the capital. At present, a person is not entitled to income support if he or she has such an interest in capital over £16,000 (regulation 45 of the 1987 Regulations). Capital of less than £6,000 has no effect on entitlement to income support. Capital of between £6,000 and £16,000 causes weekly income support to be reduced by £1 for every £250 or part of such capital (regulation 53).

5. If a person is given money in order for it to be used for a particular purpose and on condition that the money must be returned if not used for that purpose, then the money will be regarded as being held on trust by that person for that purpose and, if the purpose fails, on a resulting trust for the payer. It will accordingly, at least in general, not be treated as the person's capital, since he or she has no beneficial interest in it (Barclays Bank Limited v Quistclose Investments Limited [1970] AC 567).

6. In considering the above matters in an immigration appeal, it is important to bear in mind (a) that the appellant carries the legal burden of proving that he or she meets the relevant requirements of the immigration rules; and (b) in the light of [19] of Mahad [2009] UKSC 16, any case that depends for its success upon a third party's voluntary payment will need to be scrutinised with particular care. Much will turn on the credibility of the appellant, sponsor and third party, both generally and as to the specifics of the actual payments. The same is true in relation to any assertion that income paid to or capital or other sums held by a sponsor who is in receipt of benefits are to be treated as being subject to "Quistclose" trusts. A specific decision in an individual's favour by the Department for Work and Pensions ("DWP") will normally be determinative, unless it can be shown the DWP was materially misled. Conversely, the mere absence of an adverse DWP decision will not usually take the appellant's case materially forward.

7. Because these issues involve mixed fact and law, an appellant in an immigration appeal must be able to demonstrate, either that the actual financial position, on arrival, will be such as to make it unnecessary to rely on benefits in order to provide a standard of living equivalent to that available on means tested benefits; or that the relevant law bears on the circumstances of the family in such a way that there will be no additional recourse to public funds in so relying.

DETERMINATION AND REASONS

Introduction

1. This is the determination of the Tribunal, to which each of the panel has contributed. It concerns a respondent who is a citizen of Colombia, born on 7 November 1985. He is currently resident in Spain. Whilst in Gran Canaria, the respondent met a British citizen (the sponsor) who was working there temporarily. The parties subsequently married and two children have been born to them. The sponsor and their children live in the United Kingdom.

2. Since the birth of her children, the sponsor has not worked. She is in receipt of a number of United Kingdom state benefits. In 2010 the respondent applied for entry clearance to the United Kingdom as the spouse of the sponsor. On 26 November 2010 the Entry Clearance Officer refused the respondent's application. The Entry Clearance Officer took issue with the ability of the parties to maintain and accommodate themselves without (additional) recourse to public funds, as required by

paragraph 281 of the Immigration Rules. In essence, the Entry Clearance Officer was concerned about the sponsor's precarious financial position.

3. The notice of decision made reference to the fact that the sponsor's mother had been making payments to the sponsor at the rate of £160 per week. It is somewhat unclear from the notice of decision what, if anything, the Entry Clearance Officer made of this matter. The Entry Clearance Manager, however, writing after receipt of the respondent's notice and grounds of appeal, took issue with the credibility of these payments from the mother, since it was (mistakenly) thought that, on an annualised basis, they comprised almost the entirety of the mother's declared salary.

4. At the date of the Entry Clearance Officer's decision, there was no requirement in the Immigration Rules for the respondent to demonstrate that he had reached any objectively-set standard for conversing in the English language. The Entry Clearance Officer, nevertheless, was doubtful that the respondent's English would be such as to enable him to work in the United Kingdom. This was despite evidence that the sponsor's aunt was willing and able to give the respondent the necessary training for him to work for her company in the United Kingdom.

The proceedings in the First-tier Tribunal

5. The respondent's appeal against the Entry Clearance Officer's decision was heard at Bradford in May 2011 by Immigration Judge Henderson. The judge heard evidence from the sponsor and the sponsor's mother.

6. At paragraph 4 of the determination, the judge recorded the sponsor as explaining that the payments of £160 a week into her Nat West current account came from her mother, who "was able to support her [with] such a large sum". The sponsor was also asked, "how long her family had been supporting her". At paragraph 15, the judge recorded asking the sponsor "to clarify whether the money paid to her from her mother was as a loan or as a gift". In paragraph 18, the judge recorded the sponsor's mother as being asked "to confirm whether she required the repayment of money she gave to her daughter".

7. The judge's findings and reasons were recorded at paragraphs 22 to 31 of her determination. At paragraph 22, the judge recorded the sponsor as receiving "substantial material and emotional support from her family in this country". At paragraph 23, no doubt bearing in mind the judgments of the Supreme Court in Mahad [2009] UKSC 16, the judge described the main issue as being "whether or not the third-party support provided is assured, reliable and credible and was so at the date of the decision". The judge was satisfied that the level of income of the sponsor's mother was, in reality, considerably greater than had been thought by the Entry Clearance Officer. The mother was, accordingly, well able to make the payments of £160 a week to the sponsor. This was before one took account of the fact that the sponsor's father also worked. The couple's joint income was around £39,000 per annum.

8. The judge was plainly impressed by the manner and content of the evidence of both the sponsor and her mother. At paragraph 25, the judge accepted that the mother "would continue to support her daughter and the [respondent] for as long as necessary". At paragraph 26 the judge concluded that the mother was "in a position to provide realistic support at the current level for the foreseeable future".

9. At paragraph 27, the judge turned to the various sources of income available. The cost of maintaining the respondent, the sponsor and their child was agreed between the parties as being

approximately £222.75, which included rent. While we note that it was an agreed figure, the basis of calculation is not evident to us, though we accept that the resources of the sponsor would have been required to extend to the maintenance of a couple at income support levels rather than, as previously, the sponsor as a lone parent.

10. However, even taking account of the payment of £160, the judge concluded that the income of the sponsor from her various benefits still fell short of the required £222.75 figure, albeit by no more than around £27 (it seems, a week). At paragraph 29, the judge made two findings regarding this shortfall. The first was that “the sponsor had [a] sum of money saved in her account at the date of the decision which amounted to over £6,000 [we assess it as slightly less – see paragraph 53 below]. This money is a gift to the couple [from the mother]. I accept that this was also to be used as third party support at the date of decision”. Secondly, the judge found “that the sponsor’s mother was willing and able to provide the additional shortfall should this be necessary… given her own income and her husband’s income and the level of outgoings the couple had at that time”. The judge was, accordingly, satisfied that the maintenance and accommodation requirements of paragraph 281 of the Immigration Rules had been met.

11. So far as the respondent’s English language skills and employment prospects were concerned, the judge noted at paragraph 30 that the “changes in the Immigration Rules with regard to entry clearance and an applicant’s English knowledge came after the date of the decision” in the present case. In any event, she was satisfied that the respondent had adequate English skills, having heard evidence from the sponsor and the mother that he spoke good English. There was also an example in the form of an e-mail from the respondent that demonstrated his proficiency in the English language. At paragraph 31, the judge noted the evidence that the business of the sponsor’s aunt was no longer extant. Although there was a second job offer this “postdates the date of decision in this appeal. I have therefore not taken this into account”. Nevertheless, the judge’s findings on the money available to the couple were such as to cause the judge to allow the appeal.

The proceedings in the Upper Tribunal

12. The Entry Clearance Officer was granted permission to appeal to the Upper Tribunal against the determination of the First-tier Tribunal Judge. The Entry Clearance Officer asserted that the Home Office Presenting Officer had raised with the judge the issue of the sponsor’s “apparent failure to declare her additional income of approximately £160 per week to the relevant authorities”. The grounds attached the minute or record of the Tribunal proceedings, prepared by the Presenting Officer who had appeared before the judge, which confirmed that that officer had raised the issue of the effect on the sponsor’s benefits of both the income from the mother and the sponsor’s capital in the form of savings.

13. Prior to the initial hearing in the Upper Tribunal on 4 April 2012, the respondent’s solicitors made application pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008, to rely upon new evidence. The evidence comprised a record from a Jobcentre Plus office of a telephone call the sponsor made to the Jobcentre on 12 October 2011. According to that record:

“ In the call she states that her mother put some money into her bank account and that this money was recently transferred back to her mother’s account, approximately £6,700. This is the only information. There are no dates for the transactions, no bank statements and no letter from the customer’s mother confirming the customer’s statement. I cannot make any kind of meaningful decision without more information and/or verification. However, if the money came from her mother’s

account and went back to her mother's account then it seems likely that we would regard the customer as not being the beneficial owner of the capital whilst it was in her possession".

14. At the hearing on 4 April, the Upper Tribunal decided to admit that evidence, in the interests of justice. The Tribunal considered that the new evidence pointed to the First-tier Tribunal Judge as having erred in law, in failing to deal with the matters raised by the Presenting Officer, as evidenced in the grounds of appeal to the Upper Tribunal. In the light of the evidence from Jobcentre Plus, it was apparent that, had the judge dealt with the matter, she would not inevitably have concluded that the so-called savings of the sponsor were available to her, for the purposes of maintaining her and the respondent, since the evidence indicated that the savings had been taken out of the sponsor's bank account, and that it was apparently now being asserted that those savings were never in the sponsor's beneficial ownership.

15. On 4 April, the Upper Tribunal set aside the determination of the First-tier Tribunal, with the result that the decision in the appeal fell to be re-made by the Upper Tribunal. Although the record of what the judge was told by the witnesses at the Bradford hearing would remain, the Upper Tribunal envisaged that it would be necessary to hear oral evidence from the sponsor and her mother, in order to reach its own views on credibility.

16. The Upper Tribunal gave directions, including that the respondent should serve a comprehensive statement of the various benefits which the sponsor was receiving at the date of the decision and of all relevant statutory provisions regarding the effect, if any, on those benefits of (a) payments of income to the sponsor by third parties; and (b) savings held by the sponsor. The parties were also directed to prepare for the resumed hearing on the basis that it might be heard by a senior panel, including a judge from the Administrative Appeals Chamber of the Upper Tribunal.

17. Such a panel was, in fact, convened for the resumed hearing, which took place on 19 June 2012.

18. The sponsor gave evidence. She confirmed as true her written statement of 1 June 2012. In this, the sponsor confirmed that at the date of the Entry Clearance Officer's decision she was in receipt of income support of £61.08 per week; child benefit of £20.30 per week; and child tax credit of £55.39 per week.

19. Before the respondent made the application for entry clearance, the sponsor's mother offered to help the sponsor. Having consulted solicitors, the sponsor was advised that she needed to have money to show that she could support the respondent if he came to the United Kingdom. When the sponsor told the solicitor that her parents had spare money and would be happy to help, it was decided that £160 a week would be put into the sponsor's current account, with the intention that this would be used "by my husband or for my husband". The sponsor contended that there was "never an intention that I would use the money for me and my children". It was put into her current account to show that the money was available to the respondent, as well as to demonstrate that the sponsor's parents could spare that amount of money each week.

20. The sponsor stated that her mother would have been happy to have kept the money in her account and to have given that to the sponsor "as a lump sum for my husband, or to put the money in a separate account for the benefit of my husband, as she has done now. Now my mum has opened an account in her name with my husband as the second account holder and all the money that she gave me has been put into that account, again this money is there for his use, if needed".

21. The statement continued that the sponsor wished “to be clear that the money that my mother gave me was not for me, it was for my husband’s use, if needed.” The people at the Benefits Agency had called the sponsor recently for an interview. They said that they had “been advised by the immigration authorities that I had money from my mother and then wanted to interview me with respect to this. I told them what I have said in the statement and I asked my immigration solicitors to call them and confirm the same. My solicitor wrote a letter to the Benefits Agency to confirm my on-going immigration case and since that time, I have not heard anything further from them”.

22. The sponsor stated that if she were “to describe the money that my mum was putting into my account, I would say that this was a gift or a wedding gift for use by my husband when he came to the United Kingdom, if it was needed”. Had the sponsor known at the time that she needed to declare the money to the Benefits Agency, she would have done so. She had, in fact, informed the Benefits Agency of the matter, before she had been asked by them to attend the interview “I never had any intention of hiding this money from anyone. If I had intended to do so, I would not have put this into my current account”.

23. In cross-examination, the sponsor said that, whilst the money was going from her mother to the sponsor’s current account, she did not use that money in order to assist with her own household expenses. The change in arrangements, whereby the mother established an account with the Yorkshire Bank and caused the sponsor to transfer the accumulated sum from the sponsor’s account to that account, arose as a result of advice received, following the grant of permission to the Entry Clearance Officer to appeal to the Upper Tribunal against the decision of the First-tier Tribunal Judge.

24. In answer to a question from the Tribunal, the sponsor said that there might have been occasions when a small element of the £160 a week had been used by her, to cover shortfalls for a few days, before the sponsor’s benefits were received, but the shortfall would always be repaid. The sponsor’s bank statements confirmed that this had indeed occurred, but the amounts had been very small, as had the periods involved. The sponsor treated it as a form of very short-term borrowing. There had been no discussion between her and her mother about what would happen to the accumulated sum if, in the end, the respondent were to be unsuccessful in his application for entry clearance.

25. The sponsor’s mother gave evidence. She confirmed as true and adopted her written statement of 13 May 2012. In this, the mother explained how the sponsor had been advised by her solicitor that she would either need to be working or would need financial support from her family. The mother confirmed that she would be willing to help her daughter. After considering her financial position, the mother said that she could spare £160 a week. If more had been needed, the mother would have been able to do this with the agreement of her husband. So as to demonstrate her ability to provide the relevant money, the mother paid this into the sponsor’s account on a weekly basis. The intention for the money was that it would be used by [the respondent] or for [the respondent] and not [the sponsor] as she was on benefits and she had enough money for herself.… I would have been happy to keep the money in my account or to give this to [the sponsor] as a lump sum for [the respondent] or to put the money in a separate account for the benefit of [the respondent]”. The statement went on to confirm what had happened following the grant of permission to the Upper Tribunal; namely, that the money was removed from the sponsor’s current account and placed in a Yorkshire Bank account in the names of the mother and of the respondent.

26. Cross-examined, the mother said that the arrangement in question started in 2010. In answer to a question from the Tribunal, the mother said that she regarded the money from the very start as a gift for the respondent, not for her daughter. They had been advised to put the money, initially, in the

sponsor's own bank account. The mother did not view the money as being her own money any longer. They had not used an income bearing account because the solicitor had not advised this. When they had been told by their solicitor that the money in the sponsor's account was causing a problem regarding the visa, the decision was taken to move the money to the Yorkshire Bank account. There was no question of the sponsor using the money for her own purposes, such as to buy a car. If the sponsor had needed things for the children which she could not obtain using her benefits, the mother would have been prepared to help further, as a separate exercise.

Discussion

27. The requirement to show that a person or persons can be maintained (or will maintain themselves) "adequately" without recourse to public funds has long been a feature of the immigration rules. It continues to be a requirement for various categories of person, in the amended rules that came into force on 9 July 2012 (but see esp. Appendix FM (family members) and Appendix FM-SE (family members – specified evidence)). The former version of the rules applies to the present appeal and those others where the decision concerned was made before 9 July. In order to establish that maintenance is "adequate" under those rules, an applicant needs to show that the resources available will meet or exceed the relevant income support level set by the United Kingdom government ("the target figure"). This finding of the Asylum and Immigration Tribunal in KA (Pakistan) [2006] UKAIT 00065 has been approved by the Court of Appeal in AM v Entry Clearance Officer [2008] EWCA Civ 1082 (a finding unaffected by the subsequent appeal to the Supreme Court) and French v Entry Clearance Officer (Kingston) [2011] EWCA Civ 35 (the KA principle is reflected in the definitions of "adequate" and "adequately" in the July 2012 rules). If the applicant is intending to live with a spouse or partner in the United Kingdom, the income support level that he or she must meet will be such level as has been set by the government in respect of the couple. Where children are included, the target figure will be increased by the relevant figure or figures for each dependent child.

28. KA (Pakistan) establishes that the target figure is an "objective" one. It is therefore immaterial that the applicant and/or any relevant family, as just described, can be shown to be more likely than not to live on less than that figure.

29. The present case requires an examination of the effect, if any, of the arrival of an applicant for entry clearance upon a sponsor's entitlement to certain benefits and, thus, on the ability of the applicant to demonstrate there are available resources at or above the target figure. It particularly raises questions about the effect of (a) payments from a third party; and (b) capital sums. In determining an immigration appeal, involving whether a person can be maintained and/or accommodated without additional recourse to public funds (within the meaning of paragraphs 6 and 6A to C of the immigration rules: see the Schedule to this determination), it will often be vital that the judicial fact-finder determines the relationship between such payments/capital and the sponsor's entitlement to benefits, once the applicant has hypothetically arrived. Only by establishing this can proper findings be made as to the actual financial position of the individuals concerned.

30. In determining these matters, we had the benefit of a written opinion from Desmond Rutledge, Counsel specialising in benefits law. Despite the way in which this document was presented to us, we do not treat it as expert evidence, since it concerns United Kingdom, as opposed to foreign, law. Instead, we have, in effect, treated it as a very helpful extension of Mr Hussain's submissions as to the proper approach to be taken in cases of this kind.

(1) The relevant rules on income

31. Income support is a means-tested benefit. The decisions of the Department for Work and Pensions (“DWP”) on questions of income and capital for the purposes of income support are almost always determinative of those questions for other benefits the individual may be receiving, such as housing benefit, council tax benefit and child tax credit. Section 136(1) of the Social Security Contributions and Benefits Act 1992 (“the SSCBA 1992”) provides that income and capital should be calculated or estimated in such a manner as may be prescribed. Section 136 contains wide-ranging provisions for income to be treated as capital and for capital to be treated as income, each in prescribed circumstances. The “prescribing” is currently done by the Income Support (General) Regulations 1987 (“the 1987 Regulations”) (see paragraph 40 below). These Regulations include provisions regarding calculation of income of members of a respondent’s family; income derived from income other than earnings (including social security benefits); income treated as capital; and tariff income from capital. Neither the SSCBA 1992 nor the 1987 Regulations provide any definition of “income”. The general rule is that all income, including that from other social security benefits, is to be taken into account when calculating an individual’s entitlement to income support, unless a specific disregard applies.

(2) “Disregards” for social security benefits

32. The list of “disregards” in Schedule 9 to the 1987 Regulations provides that income from the following benefits is completely ignored:

(a) Child Benefit (in most situations);

(b) Child Tax Credits;

(c) Housing Benefit, and

(d) Council Tax Benefit.

(3) Disregards for ”voluntary payments”

33. Schedule 9 to the 1987 Regulations provides that “voluntary payments” made on a regular basis to a person are to be disregarded as the income of that person:-

“ 15(1) Subject to sub-paragraph (3) and paragraph 39, any relevant payment made or due to be made at regular intervals.

…

(5A) In this paragraph, “relevant payment” means –

(a) a charitable payment;

(b) a voluntary payment;

(c) a payment (not falling within sub-paragraph (a) or (b) above) from a trust whose funds are derived from a payment made in consequence of any personal injury to the claimant.”

34. The expression “voluntary payment” fell to be interpreted by Laws J in R v Doncaster Borough Council ex parte Boulton) [1993] 25 HLR 195. The case involved payments made by British Coal to the widows of retired miners in lieu of free coal. Laws J held that the word “voluntary” is commonly used in law both as the antithesis of something done under compulsion and as denoting the obtaining or giving of something without anything being obtained on return. The precise meaning the word bore in any piece of legislation depended on the context and purpose of that legislation. In the context with

which Laws J was concerned, it was the second of those two meanings which applied. Since British Coal had entered into the Concessionary Coal Agreement in the interests of good labour relations, it did obtain something in return for making the payments. The payments were, accordingly, not voluntary. The key passages from the judgment are as follows:-

“I therefore think it right to proceed on the basis that (a) the applicant was paid under the provisions of successive national agreements between British Coal and the Union and (b) she had no private law claim to the money. On that footing I return to the question in the case which I have identified which requires me to construe the regulations. In argument before me all parties have agreed that the word ‘voluntary’ bears two different senses in the law. In Overseers of the Savoy v. Art Union of London [1896] A.C. 296, Lord Halsbury said this at p.305: ‘My Lords, there is no doubt that the word ‘voluntary’ is constantly used in two different senses: it is constantly used as the antithesis of something done under compulsion; but it is also used commonly among lawyers – and not uncommonly among other people – as denoting the obtaining or giving of something without anything being obtained in return. A lawyer speaks of a voluntary conveyance as opposed to one which involves valuable consideration. It is common to hear of some institution supported by voluntary contributions. There is no doubt of the frequent use of the word ‘voluntary’ in both these senses; and the problem to be solved is in what sense, or in which of these two senses, the Legislature has used the word in the section under construction…”

“… What, then, is the purpose in making a special exception by way of disregard in the case of ‘any charitable payment or of any voluntary payment’? I can discern no sensible purpose in according a disregard to any regular payment whatever which happens not to be legally enforceable. In the case of a charitable payment, I think the purpose clear: it is to ensure that bodies which administer funds to the disadvantaged under charitable trusts, and thus shoulder part of the burden of looking after people in our society in difficult or distressed circumstances, should be assured that their intended beneficiaries obtain the fruits of their charity in full and that the payments they make will not simply go pro tanto to relieve the State’s obligations. If that is right, this policy I think gives colour to that which underlies the disregard of voluntary payments in the same regulation. In his skeleton argument, Mr. Howell [counsel for the DSS] made this submission which I accept:

‘Charitable payments are made for benevolent purposes. But not all payments made for benevolent purposes are necessarily charitable. (To be charitable, for example, a purpose has to be one that benefits the public of a sufficient section of it rather than individuals). The effect of specifying both charitable and voluntary payments is to enable payments which are not made for the payer’s own benefit to be brought within the scope of the disregard without the need to engage with fine distinctions between charitable and non-charitable payments’.

It is not necessary, to appreciate the force of this submission, to embark upon any discussion of the law of charitable trusts for which I at any rate would be poorly equipped. Arrangements might well be made by a body for the relief of some particular group within those entitled to housing benefit without there being in place all the legal requirements for the existence of a charitable trust. In my view Mr. Straker made an illuminating submission, which I also accept, when he said that the question whether a payment is voluntary is to be judged by looking at the volunteer not the recipient so that the issue is not whether the payee has any legal rights: it is, rather, what is the nature of the payment from the putative volunteer’s point of view? Looked at in this way the nature of the legislative policy here becomes entirely clear; it is in fact precisely the same as that relating to the charitable payments. The legislator is looking at a payment which is made, to use Lord Halsbury’s words, without anything being obtained in return. There may, I suppose, even be cases where the recipient of the payment

could enforce it; certainly there will be cases where the payer has undertaken an obligation, at least in a broad sense of the word, to make the payment ."

35. The Boulton case has been considered on a number of occasions by the Social Security Commissioners (predecessors of the Administrative Appeals Chamber of the Upper Tribunal). In case R(H) 5/05 Mr Commissioner Mesher had to consider the effect of an informal loan, consisting of irregular payments made to a claimant by his girlfriend over a period of the year, following the claimant's inability to work after a stroke. The girlfriend had written a letter indicating that the payments from her were by way of a loan to be repaid at some unspecified date. The Commissioner held that the overall circumstances showed there had been no intention to create legal relations and therefore no legally enforceable rights or obligations were created by the payments to the claimant. The case was distinguishable from Boulton because the girlfriend making the loan got nothing in return, tangible or otherwise. The Commissioner held that the "maintenance of a relationship of personal affection or a familial duty" on the part of the payer did not constitute an intangible benefit for the payer sufficient to disqualify the payments as a voluntary payment.

36. The Asylum and Immigration Tribunal's findings in KA (Pakistan) regarding disregards for voluntary payments related to legislative provisions, which have been superseded. The AIT's findings at [21] on that particular issue should, accordingly, no longer be followed.

37. The final point to observe in relation to voluntary payments is that the 1987 Regulations (regulation 48(9)) treat income as capital where the voluntary payments are made on an irregular basis. In other words, such payments are treated as individual capital lump sums.

(4) The rules on capital

38. This brings us to the way in which capital is treated for the purpose of means-tested benefits. Generally speaking, "capital" means a lump sum or one-off payment rather than a series of payments (but see paragraph 35 above). Capital sums are distinguished from income because they are not payable in respect of a specific period or periods and do not form part of a regular series of payments (R v Supplementary Benefits Commission ex parte Singer [1973] 1 WLR 713). Before examining the effect of holding capital on entitlement to benefits, it is important to make the following point. Capital will not be taken into account at all unless the respondent has a beneficial interest in it. In CIS/7097/1995 , Mr Commissioner Howell QC said:-

" It is common ground (and rightly so) that what basically has to be assessed for income support is the value of the capital resources belonging to the individual respondent, corresponding broadly with what he is expected to use towards his own maintenance before turning to public assistance; and that what has to be looked at is the true beneficial ownership, not the legal title to or control over the assets to which a person may have a beneficial interest ."

39. Where an individual does have a beneficial interest in the capital, the basic rules are as follows. He or she is not entitled to income support if he or she possesses capital over the prescribed amount (currently £16,000): SSCBA 1992, section 134 and Income Support (General) Regulations 1987, regulation 45), unless the capital falls within one of the "disregards" listed in Schedule 10 to the 1987 Regulations.

40. Capital under £6,000 is ignored and does not affect benefit entitlement (1987 Regulations, regulation 53). Where the capital is over £6,000 but under £16,000, the individual continues to be entitled to income support; but some income from the capital is assumed (regulation 53(1A)). Such

income is called “tariff income”. Its effect is that weekly payments of benefit will be reduced by £1 for every £250 or part the claimant has over £6,000 but under £16,000 (regulation 53(2)).

(5) “Quistclose” trusts

41. The result of the “beneficial interest” test described above means that, for example, a loan paid into an individual’s bank account will normally count as his or her capital. There is a beneficial interest in the money. But, if a person is paid money in order for it to be used for a particular purpose and on the condition that the money must be returned if not used for that purpose, then the money will be regarded as being held on trust by that person for that purpose and, if it fails, on resulting trust for the original payer. It will, accordingly, at least in general, not be treated as that person’s capital, since he or she has no beneficial interest in it.

42. The leading case on this matter is Barclays Bank Limited v Quistclose Investments Limited [1970] AC 567. The precise details of that case need not concern us. A succinct summary of the difference between a loan and the principle underlying “Quistclose trusts” is contained in Halsbury’s Laws of England, Trusts (Volume 48) (2007 re-issue), paragraph 711:-

“ Money advanced by way of loan normally becomes the property of the borrower. He is free to apply the money as he chooses and save to the extent to which he may have taken security for repayment, the lender takes the risk of the borrower’s insolvency. However, where money is advanced to a borrower for a stated purpose and the borrower accepts it on terms that the money will be used exclusively for that purpose, the money is impressed with a trust for that purpose, a so-called ‘Quistclose trust’. The recipient acquires no beneficial interest in the money, at least while the designated purpose is still capable of being carried out. If the designated purpose fails (for example, because the recipient goes into liquidation), the money will not form part of the borrower’s general funds but will be held for the lender.

Keeping the money in a separate account is clear evidence that it is intended for a special purpose but it is not essential”.

(6) Applying these principles in an immigration appeal

43. In applying these principles in the case of an immigration appeal, it is important to bear the following matters in mind. First, the appellant carries the legal burden of proving, on the balance of probabilities, that he or she meets the relevant requirements of the Immigration Rules. Secondly and relatedly, it is necessary to recall what the Supreme Court said in Mahad . There, the Secretary of State contended (unsuccessfully) that an advantage in construing certain Immigration Rules as excluding third party support was that it would avoid the need to investigate promises of financial support, which were “necessarily more precarious… or precarious and… more difficult to verify”, and that the Immigration Rules “do not provide for undertakings to be taken from third parties”. In rejecting those submissions Lord Brown said this:-

“ 19. Whilst I readily acknowledge the legitimacy of each of these concerns, their strength seems to me much diminished by a number of considerations. First, whilst I accept that generally speaking unenforceable third party promises are likely to be more precarious and less easily verifiable than the sponsor’s own legal entitlements, that will not invariably be so. And it would surely be somewhat anomalous if ECOs could accept promises of continuing accommodation and/or employment and yet not promises of continuing payments, however regularly they can be shown to have been made in the past and however wealthy the third party can be seen to be. Are rich and devoted uncles (or, indeed,

large supportive immigrant communities such as often assist those seeking entry) really to be ignored in this way? A second consideration, never to be lost sight of, is that it is always for the applicant to satisfy the ECO that any third party support relied upon is indeed assured. If he fails to do so, his application will fail. That this may be difficult was recognised by Collins J himself in Arman Ali (page 103):

" I do not doubt that it will be rare for applicant to be able to satisfy an Entry Clearance Officer, the Secretary of State or an Adjudicator that long-term maintenance by a third party will be provided so that there will be no recourse to public funds. But whether or not such long-term support will be provided is a question of fact to be determined on the evidence".

Of course there may be difficulties of investigation. But that is already so with regard to many different sorts of application and, indeed, is likely to be so with regard to some of the kinds of third party support already conceded to be acceptable."

44. The conclusion to be drawn is, accordingly, that any case which depends for its success upon a third party's voluntary payment will need to be scrutinised with particular care. That is so of all such cases, whether or not the third party payments fall to be examined by reference to their potential effect on State benefits provided to a sponsor, the continued entitlement to which is relevant to the outcome of the appeal. Much will turn on the credibility of the appellant, sponsor and third party, both generally and as to the specifics of the actual payments.

45. The same is true in relation to any assertion on behalf of an appellant that income paid to or capital sums held by a sponsor who is in receipt of benefits are to be treated as being subject to "Quistclose trusts". Judicial fact-finders will usually need to have cogent, credible evidence before finding that capital held by an individual is, in truth, held on such a trust. A specific decision on the matter in an individual's favour by the DWP will normally be determinative, unless it can be shown that that Department has been materially misled. On the other hand, the mere absence of an adverse DWP decision will not usually take the appellant's case materially forward, particularly if there is nothing to suggest that the existence of the capital has been brought to the DWP's attention.

46. It seems to us that, since these issues involve mixed fact and law, an appellant in an immigration appeal must be able to demonstrate to the judicial fact-finder, either that the actual financial position on arrival will be such as to make it unnecessary to rely upon benefits in order to provide a standard of living equivalent to that available on means tested benefits, or that the relevant law bears on the circumstances of the family, in such a way that there will be no additional recourse to public funds in doing so.

(7) The circumstances of the present case

(a) Findings of fact, including credibility

47. We now turn to the circumstances of the respondent's case. Like the First-tier Judge, we have had the opportunity of receiving oral evidence from the sponsor and her mother. As that judge found, we have concluded that both are entirely credible witnesses. They each gave their evidence in a straightforward manner. There were no material discrepancies. Mr Saunders did not seek to make any submissions regarding their credibility.

48. The truth of the matter is, we find, essentially as the sponsor and her mother have said. Legal advice was sought before the making of the respondent's present application for entry clearance. Fortunately for the respondent, the sponsor and her mother were able to act on the advice, since the

mother and her husband have ample financial resources to fund the respondent in the United Kingdom, not just at the time of entry but also until such time as he may be able to obtain remunerative employment, such that he and his immediate family are able to maintain themselves without additional recourse to public funds or third party support.

49. We find that the respondent has shown on the balance of probabilities that the weekly sums paid, initially into the sponsor's bank account and subsequently into the Yorkshire Bank account in the name of the mother and the respondent, were never such as to fall within the sponsor's beneficial ownership. Both these sums and the resulting capital sums were held by the sponsor under "Quistclose" trusts (although the sponsor and her mother were no doubt unaware of this terminology).

50. We accept, as did the First-tier Tribunal judge that, if necessary, any further small shortfall, would be similarly met by the mother and that this intention and ability on her part existed at the date of the entry clearance officer's decision. In fact, for the reason given by the First-tier Tribunal judge, there is no need for the mother to do so: the capital sum available for the respondent to use after his arrival will plainly cover it.

(b) The position on arrival in the United Kingdom

51. With this last finding, we come to the hypothetical position upon the respondent's arrival in the United Kingdom shortly after the decision on the entry clearance application. The effect of that arrival upon the benefits position needs to be considered in the following respects.

52. First, the sponsor would no longer be a lone parent. If the sponsor needed to maintain the income she was receiving by way of income support, we find that she would be able to claim jobseeker's allowance in place of that former benefit. She would of course have to submit to the various conditions regarding availability for work etc which attach to that benefit. We infer that, although she has two very young children, if necessary the respondent could make himself available for childcare. The rates for income-based jobseeker's allowance and income support are, in fact, the same. For the purpose of entitlement to means-tested benefits, the respondent's liability to immigration control means that the couple will be treated as a single person (see 1987 Regulations, Schedule 7, para 16A and Jobseeker's Allowance Regulations 1996, Schedule 5, paragraph 13A(a)). In this respect at any rate, the result of the respondent's arrival would not be to cause the couple to be entitled to increased or additional public funds, contrary to paragraphs 6A to C of the immigration rules.

53. Second, the respondent would come into possession of the sum of £5920, which we calculate was the amount accumulated as at the date of decision. The assets of the respondent and sponsor would fall to be aggregated for the purposes of assessment of entitlement to benefits (regulation 32 of the 1987 Regulations), notwithstanding the respondent's status as a person subject to immigration control. But that capital sum, being under £6000, would be ignored (paragraph 40 above); and, even though that this sum would have grown by £160 a week over the period between the date of that decision and the time when (assuming the decision had been in the respondent's favour and not appealed) he would have arrived in the United Kingdom, it can be seen from the figures for tariff income in paragraph 40 above that the reduction in benefit caused by regulation 53(2) would have been so small as to be, in all the circumstances, immaterial.

54. Third, there are the weekly payments from the sponsor's mother. We accept her evidence that she would continue to pay the £160 a week to the respondent, after his arrival, until such time as it was no longer needed. Unlike the position pre-arrival, where the weekly sums have been paid under Quistclose trusts, post-arrival the sums would come into the respondent's immediate legal and

beneficial ownership. The circumstances in which they were paid by the mother would, we find, be directly analogous to those in R (H) 5/05 (paragraph 33 above). They would be voluntary payments, which would fall to be disregarded by reason of Schedule 9 to the 1987 Regulations (paragraph 33 above) or, more probably by then, the equivalent provision in the 1996 Regulations: Schedule 7, paragraph 15.

55. Fourth, the amount of child benefit is determined by the number of children. Child benefit is not means-tested and is not "public funds" within the meaning of paragraph 6 of the immigration rules. The respondent's arrival would have no impact.

56. Fifth, we can see no reason why the amount of child tax credit should be any different if the respondent were to be in the United Kingdom.

57. Sixth, we need to consider the position regarding housing benefit. At the date of decision the sponsor was living in two-bedroomed accommodation provided by a registered social landlord, who was content for the respondent to live there also (no issue was taken regarding adequacy of accommodation). Accordingly, there would be no change in the family's accommodation requirements and, thus, no increase in the "eligible rent" used for the purposes of the sponsor's housing benefit claim. There would, as a result, be no change to the sponsor's housing benefit.

58. Seventh, we need to say something about council tax benefit. Council tax did not feature as an issue between the parties at the hearing and the evidence regarding it is, consequently, not very detailed. Nevertheless, it appears as a matter of law that there would in one sense be a change in the family's entitlement to benefits, following the respondent's arrival, as regards council tax benefit. At the date of decision the sponsor's liability to council tax, in respect of her house, would have been reduced by 25% because she was the only "resident", as defined by the relevant legislation (Local Government Finance Act 1992, section 6). The absence of any evidence of payments of council tax by the sponsor indicates (as one would expect) that, as a person in receipt of income support, the sponsor's liability to council tax was being met in full by council tax benefit.

59. The arrival of the respondent would mean that the sponsor would no longer be the only "resident". The 25% discount would, accordingly, cease to apply. The sponsor's continuing entitlement to income support (or income-based jobseeker's allowance) means that she would become entitled to council tax benefit covering her new, larger council tax liability. There is a sense in which this is a mere matter of accounting. Pre-arrival, the sponsor is spared having to meet the council tax liability in respect of her home by a combination of the 25% discount and by council tax benefit. Post arrival, this would happen entirely by virtue of council tax benefit. Nonetheless, unless the sponsor can disclaim at least so much of the benefit as is equivalent to the former discount, the respondent risks falling foul of paragraph 6C of the immigration rules, since the benefits paid to the family will be greater than those paid before he arrived in the United Kingdom.

60. On a reading of paragraph 6C, there could be said to be no problem with this scenario. The recourse to public funds described in that paragraph arises only where the person concerned (P) " relies upon the future entitlement to any public funds that would be payable to P or P's sponsor as a result of P's presence in the United Kingdom" (our emphasis). If the respondent and the sponsor can show they would not need to rely on the additional council tax benefit in order to meet the KA (Pakistan) benchmark, then paragraph 6C has no purchase. Since we heard no argument on this issue, we do not consider we can reach any substantive conclusion. In any case, it is unnecessary to do so for the following reason.

61. Subject to immaterial exceptions, section 1 of the Social Security Administration Act 1992 makes it a condition of entitlement to any benefit that a person has made a valid claim for it. Although we are unaware of any mechanism whereby, following the respondent's arrival, the sponsor could claim what would represent only 75% of her new council tax benefit, she plainly could decide not to claim any of it. Drawing on the experience of Judge Ward, who normally sits in the AAC Chamber of the Tribunal, by reference to the location and size of the sponsor's property, even on a conservative assumption the council tax is highly unlikely to have been more than £30 a week. It is clear from the evidence that the capital sum will cover this amount, the additional cost of maintaining a couple rather than a lone parent by reference to the income support rates and the very modest amounts necessary to compensate for the attribution of tariff income, should that be necessary. The resolve of the sponsor and her mother to do everything necessary to ensure compliance with the rules is, we find, such that they would if necessary adopt the course of action we have just described (and would have done so as at the date of decision).

62. The final point to be made in relation to the post-arrival situation is one which did not feature in argument before us, but which we consider needs to be addressed, for completeness. Despite passages in the judgments in AM and French that might at first sight be said to point to the contrary, we do not consider that those judgments (or those in Abubakar v Entry Clearance Officer (Sana'a) [2012] EWCA Civ 377) mean that actual income support paid to a United Kingdom sponsor must be disregarded in calculating the income available to the applicant and sponsor, post arrival. At [76] to [80] of AM , Laws LJ in effect held that it was not possible for a sponsor mother to apply part of her income support towards the maintenance of her son, MA; however, in so holding, it seems the Court of Appeal did not approach the matter on the basis, since established by the Court of Appeal judgments cited at paragraph 27 above, that the post-arrival incomes of applicant and sponsor fell to be aggregated. The Court of Appeal's approval of KA (Pakistan), in relation to what the AIT in that case had said about the relevant income support level being the target figure (which was not to be diminished by claims that a person or persons could, in reality, live on less) would be undermined if actual income support paid to a sponsor must be disregarded for the purposes of calculating the income support available to the family unit. For then the target figure would, in reality, be higher than the income support level for that family. Nothing in French or Abubaka r supports such a result.

(c) Conclusion

63. The consequence of these findings is that the respondent has shown on balance that he meets the requirements of paragraph 281 of the Immigration Rules. Were he to be granted entry clearance as the spouse of the sponsor, this would not involve any additional recourse to public funds.

Decision

64. The determination of the First-tier Tribunal having been set aside, we hereby re-make the decision as follows. The respondent's appeal is allowed.

Signed Date

Upper Tribunal Judge Peter Lane

Immigration and Asylum Chamber

SCHEDULE

PARAGRAPH 6 OF THE IMMIGRATION RULES (AS IN FORCE IN RESPECT OF APPLICATIONS MADE BEFORE 9 JULY 2012)

……

'public funds' means-

"(a) housing under Part V1 or V11 of the Housing Act 1996 and under Part !! of the Housing Act 1985, Part 1 or 11 of the Housing (Scotland) Act 1987, Part 11 of the Housing (Northern Ireland) Order 1981 or Part 11 of the Housing (Northern Ireland) Order 1988;

(b) attendance allowance, severe disablement allowance, (carer's allowance) and disability living allowance under Part 111 of the Social Security Contribution and Benefits Act 1992; income support, … council tax benefit, … and housing benefit under Part V11 of that Act; a social fund payment under Part V111 of that Act; child benefit under Part 1X of that Act; income based jobseeker's allowance under the Jobseekers Act 1995; (state pension credit under the State Pensions Credit Act 2002; or child tax credit and working tax credit under Part 1 of the Tax Credits Act 2002).

(c) attendance allowance, severe disablement allowance, (carer's allowance) and disability living allowance under Part 111 of the Social Security Contribution and Benefits (Northern Ireland) Act 1992; income support, … council tax benefit, … housing benefit under Part V11 of that Act; a social fund payment under Part V111 of that Act; child benefit under Part 1X of that Act; or income based jobseeker's allowance under the Jobseekers (Northern Ireland) Order 1995.

(d) …

PARAGRAPHS 6A TO C OF THE IMMIGRATION RULES (AS IN FORCE IN RESPECT OF APPLICATIONS MADE BEFORE 9 JULY 2012)

6A For the purpose of these Rules, a person (P) is not to be regarded as having (or potentially having) recourse to public funds because P is (or will be) reliant in whole or in part on public funds provided to P's sponsor unless, as a result of P's presence in the United Kingdom, the sponsor is (or would be) entitled to increased or additional public funds (save where such entitlement to increased or additional public funds is by virtue of P and the sponsor's joint entitlement to benefits under the regulations referred to in paragraph 6B).

6B Subject to paragraph 6C, a person (P) shall not be regarded as having recourse to public funds if P is entitled to benefits specified under section 115 of the Immigration and Asylum Act 1999 by virtue of regulations made under sub-sections (3) and (4) of that section or section 42 of the Tax Credits Act 2002.

6C A person (P) making an application from outside the United Kingdom will be regarded as having recourse to public funds where P relies upon the future entitlement to any public funds that would be payable to P or to P's sponsor as a result of P's presence in the United Kingdom, (including those benefits to which P or the sponsor would be entitled as a result of P's presence in the United Kingdom under the regulations referred to in paragraph 6B).